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SUPREME COURT OF THE UNITED STATES.

No. 200.

JOHN FITCH, DEF'T AND APP'T,

vs.

EDWARD CREIGHTON.

APPEAL FROM THE CIRCUIT COURT U. S. FOR THE NORTHERN DISTRICT OF OHIO.

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UNITED STATES OF AMERICA,
Northern district of Ohio:

By the honorable Hiram V. Willson, one of the judges of the circuit court of the United States for the seventh circuit and northern district of Ohio:

TO EDWARD CREIGHTON:

Whereas John Fitch has lately appealed to the Supreme Court of the United States, from a decree lately rendered in the circuit court of the United States for the seventh circuit and northern district of Ohio, made in favor of you, the said Edward Creighton, against the said John Fitch, and has filed the security required by law:

You are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the first Monday in December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Cleveland, in said district, the 24th day of March, in the year of our Lord one thousand eight hundred and fifty-eight, and of the independence of the United States of America the eighty-second.

H. V. WILLSON,
U. S. Judge.

Service acknowledged.

EDWARD CREIGHTON,
By BASSETT & KENT,
His Solicitors.

March 26, 1858.

[Endorsed:] John Fitch, appellant, vs. Edward Creighton, appellee. Citation. Returned and filed March 27, 1858. F. W. Green, clerk.

UNITED STATES OF AMERICA,
Northern District of Ohio.

At a special and adjourned term of the circuit court of the United States for the northern district of Ohio, held pursuant to the rules of said court, and also pursuant to adjournment of said court from the November term A. D. 1857, at the city of Cleveland, in said district, on the second Tuesday of February, being the ninth day of that month, in the year of our Lord one thousand eight hundred and fifty-eight, and of the independence of the United States of America the eighty-second—

Present, the honorable Hiram V. Willson, district judge, and one of the judges of said court—

Among the proceedings then and there had were the following, to wit:

EDWARD CREIGHTON
vs.
JOHN FITCH. } No. 415. In chancery.

Be it remembered that heretofore, to wit, on the twenty-eighth day of November, in the year of our Lord one thousand eight hundred and fifty-six, came the said complainant, by his solicitors, and filed in the clerk's office of said court his bill of complaint herein, in the words and figures following, to wit:

To the honorable the judges of the circuit court of the United States for the northern district of Ohio: Edward Creighton, of Keokuk, in the State of Iowa, and a citizen of the State of Iowa, brings this his bill against John Fitch, of Toledo, a citizen of the State of Ohio. And thereupon your orator complains and says that on the thirtieth day of December, A. D. 1854, the city council of the city of Toledo, a municipal corporation within the said northern district of Ohio, passed an ordinance providing for the grading and improvement of the following streets in the said city, to wit: Washington street, between the westerly line of lot 370 and its junction with Don street; Monroe street, between Michigan and Thirteenth street; Michigan street, between Monroe street and the westerly line of lot No. 1456, Visitula Division; and the portions of Tenth, Eleventh, and Twelfth streets lying between Monroe and Washington streets; and further providing that the expense of said improvement should be assessed upon the lots abutting upon said streets respectively, according to the number of feet front.

Your orator further states, that in pursuance of the said ordinance, on the seventh day of April, A. D. 1855, the said city council entered into the agreement with your orator and one Edward Conelley, a copy of which is hereto attached, and made part of this his bill of complaint, marked "A," whereby your orator and said Conelly agreed to make said improvement, all of which will fully appear by reference to said agreement attached as aforesaid.

Your orator further states that he, immediately after the making of said contract, purchased of the said Conelly all his interest therein, and commenced the work therein named. and in all respects completed and fulfilled the same, to the acceptance of the said city council; and the said city council afterwards, to wit, on the twentieth day of May, A. D. 1856, made an assessment on the lots abutting upon said improvement upon Michigan street, to pay him for said work and materials, and by their resolution directed the owners of said lots to make payment of said assessment to your orator; all of which will more fully appear by reference to a copy of said resolution, hereto attached and made a part of this bill, marked "B."

Your orator further states that among the lots so assessed as aforesaid, were the following, of which the defendant, John Fitch, at the time of said assessment, was and still is the owner, and that the following sums were assessed upon each of said lots respectively, to wit, on lot five hundred forty-seven, three hundred and seventy-two dollars and six cents; on lot five hundred and thirty-eight, three hundred and forty-three dollars and fifty-two cents; on lot five hundred and thirty-nine, three hundred and seventy-two dollars and six cents; on lot five hundred and forty-one, three hundred and seventy-two dollars and six cents, (all of which lots are in the Port Lawrence division of said city of Toledo: and on lot fourteen hundred and sixty-one, in the Vistula division of the said city of Toledo, three hundred and seventy-two dollars and six cents.

Your orator further states that on the fourteenth day of April, A. D. 1856, the said city council made an assessment upon the lots abutting upon said improvement upon Monroe street, to pay him for said work and materials, and directed the owners of said lots to make payment thereof to your orator, by their resolution then duly passed, and that among said last-named lots was lot number six hundred and forty, in the Port Lawrence division of said city of Toledo, of which the defendant then was and still is the owner, upon which was assessed as aforesaid the sum of eighty-four dollars and fifty-six cents.

Your orator further states that on the twenty-third day of March, A. D. 1855, the said city council of the said city of Toledo passed an ordinance providing for the grading and improvement of Indiana avenue, a street in said city, and providing that the expense of said improvement when made should be assessed upon the lots abutting upon said street according to the foot front; and that afterwards, on the fifth day of June, A. D. 1855, the said city council, in pursuance of said ordinance, entered into a contract in writing with your orator and one Edward Conelly to make the said improvement, all of which will fully appear by reference to the copy of said contract hereto attached, marked "C," and made part of this bill of complaint.

Your orator further states that he purchased of the said Conelly all his interest in said contract, and immediately after the execution thereof commenced the work therein named, and in all respects completed and fulfilled the same to the acceptance of the said city council; and the said city council afterwards, to wit, on the twenty-eighth day of June, A. D. 1856, made an assessment upon the lots abutting upon said street, to pay him for said work and materials, and by their resolution directed the owners of said last-named lots to make payment of said assessment to your orator.

Your orator further states that among the lots so assessed as last aforesaid were the following, of which the defendant was, at the time of said assessment and still is the owner, and that the fol-

lowing sums were assessad upon each of said lots respectively, to wit: on lot six hundred and eighty-six, sixty-one dollars and ninety-seven cents; on lot seven hundred and fifty-one, sixty-one dollars and ninety-seven cents; and on lot eight hundred and fifty-five, one hundred and forty-two dollars and fifty-three cents; all of which lots are in the Port Lawrence division of said city of Toledo.

Your orator further states that none of said several sums of money, or any part thereof, has been paid to him by said defendant, although he has been often requested so to do. Your orator therefore prays that your process of subpœna may issue, making the said John Fitch defendant hereto, and that upon his corporal oath he may be compelled to answer all and singular the allegations of this bill; and that upon the hearing hereof, your honors will decree that said sums of money are liens upon the said lots upon which they have been respectively assessed; that an account be taken of the amount due to your orator thereon, and that the defendant be ordered to pay the same, together with five per centum penalty thereon, allowed by law, within a short day to be named, or that in default thereof said lots be sold; and the money which shall arise from said sale be applied in payment of the said amounts that shall be found due, and for such other and further relief as equity and good conscience shall require, and to your honors shall seem meet.

BASSETT & KENT,
Solicitors for Comp't.

Exhibit A, referred to in the foregoing bill.

This article of agreement, made and confirmed this seventh day of April, in the year of our Lord one thousand eight hundred and fifty-five, between Edward Connelly and Edward Creighton, of the first part, and the city of Toledo, acting by Samuel B. Scott, president of said city council, its authorized agent, party of the second part, witnesseth: that the said party of the first, for and in consideration of the covenants, stipulations, and agreements herein contained and set forth, doth hereby covenant and agree with said party of the second part, for themselves, their heirs, executors, and administrators, that they, the said party of the first part, shall and will, on or before the seventeenth day of April, in this present year, commence the grading and improvement of the following named streets, namely, Washington street, between the westerly line of lot 370 and its junction with Dow street; Monroe street, between Michigan and Thirteenth street; Michigan street, between Monroe street and the westerly line of lot No. 1456, Vistula division; and the portions of Tenth street, Eleventh street, and Twelfth street lying between Monroe and Washington streets, and shall excavate and fill in to the proper width, and to and in agree-

ment with the established grade of each street above designated, and arch and ditch said streets severally; and put in all the necessary culverts and sluices, and finish and complete all and every of the above mentioned grading and improvement on or before the first day of November, 1855, in accordance with the provisions of an ordinance of the city council to provide for the grading of the streets above named, passed December 30, 1854, and to the satisfaction and acceptance of the street commissioner and a majority of the committee on streets, at the rate and price of fourteen cents (14 cts.) per cubic yard, for all embankment and excavation in all the streets above named, except Michigan, and nineteen cents per cubic yard for Michigan, and twenty-five dollars per 1,000 feet for all lumber used in the construction of culverts and sluices, which prices shall be in full of all labor and materials used in the full completion of the work and improvement above mentioned. The lumber used shall be of white or burr oak, black walnut, or red elm, good and sound, and the culverts and sluices constructed in the manner, of the capacity, and in the localities the street commissioner, or a majority of the committee on streets, may designate, and well spiked together with six-inch wrought-iron spikes; and any excavations in Michigan street, 10 cents per cubic yard.

And the city of Toledo, party of the second part, for and in consideration of the faithful performance of the above mentioned work and improvement on the part of the party of the first part, covenants and agrees to pay to said party of the first part, their heirs, executors, administrators, and assigns, the above mentioned rates and prices, in full of all labor and materials and every expenditure in fully completing said work and improvement, in the following manner:

Whenever said party of the first part shall have fully completed the above-mentioned work and improvement in the manner above specified in this contract, said street commissioner shall give said party of the first part a certificate to that effect, on the presentation of which to the city council said council shall assess the costs and expenses of completing said work and improvement on the lots or lands made liable by law to pay said costs and expenses, and shall make out and deliver or cause to be made out and delivered a certified copy of said assessments unto said party of the first part, and authorize and empower said party or his assigns to collect the several amounts due and payable for said work and improvement.

And it is mutually agreed upon between the parties to this contract, that in case the work herein specified should not progress so rapidly as this contract intends, or on failure of said party of the first part to comply with the requirements of the street commissioner, from time to time, without delay, the said party of the second part may employ additional laborers and teams to hasten and complete said work, or reconstruct any part of said work which may require reconstruction, at the costs of the party of the first part.

In testimony whereof, the parties to this contract have affixed, the party of the first part, their own proper hands and seals, and the city of Toleda, the signature of Samuel B. Scott, president of said city council, and the corporate seal of said city.

E. CONNELLY, [SEAL.]
E. CREIGHTON, [SEAL.]
SAM'L B. SCOTT,
President Council.

Exhibit "B," referred to in the foregoing bill.

Resolved by the city council, of the city of Toledo, that the assessment for grading Michigan street, between Monroe street and the west line of lot No. 1,456, Vistula division of Toledo, be, and the same is hereby confirmed, and that the respective owners of the lots, or parts of lots and lands abutting on said street between the points aforesaid, be and they are hereby required and directed to pay to Edward Creighton, or his assigns, the amounts assessed by said city against said lots, or parts of lots or lands, to pay the expenses of grading said street, between the points aforesaid, in pursuance of the contract of Connelly & Creighton, April 7th, 1855; and the said Creighton, or his assigns, are hereby authorized to demand and receive the same in his own name, or the name of his assigns, and in his own or in the name of his assigns to collect the same by suit or otherwise from the person or persons liable to pay the same, and to enforce the collection of the said sums against the lots or parts of lots or lands properly chargable with the payment thereof, together with all legal costs, charges, and penalties.

Adopted, May 20th, 1856.

STATE OF OHIO,
Lucas County, ss:

CITY CLERK'S OFFICE, CITY OF TOLEDO.

I hereby certify that the foregoing are true copies of an assessment and the resolution confirming the same, passed by the city council of Toledo, at a meeting held on the 20th day of May, 1856.

[SEAL.] In witness whereof, I have hereto set my hand and official seal, this 22d day of May, 1856.

C. C. SHENCK,
City Clerk.

Exhibit "C," referred to in the foregoing bill.

This article of agreement, made and confirmed this fifth day of June, A. D. 1855, between Edward Creighton and Edward Connelly, of the city of Toledo, parties of the first part, and the city of Toledo, acting by and through Samuel B. Scott, president of the city council, party of the second part, witnesseth, that said party of

the first part, for and in consideration of the price hereinafter named, and of the covenants and agreement, and herein contained and set forth, doth agree with said city of Toledo, party of the second part, for themselves, their heirs, executors, and administrators, that said party of the first part shall, on or before the 10th day of June, A. D. 1855, commence, and well and truly grade Indiana avenue, from its junction with Washington street to the Toledo Plank Road, and make all necessary culverts required on or in said street or avenue, and shall form, arch, and ditch the same in agreement with the established grade of said avenue, now on record in the office of the city engineer of said city, and in accordance with an ordnance to provide for said improvement, passed March 23d, 1855, to the acceptance and satisfaction of the street commissioner and city engineer of said city, at the rate of thirty-three cents for excavation, and nothing for embankment, and thirty dollars per thousand feet for lumber for culverts, which said rates shall be in full for all labor done and materials furnished in the completion of said improvement. And it is hereby covenanted and agreed between the parties hereto, that all of said improvement shall be fully completed on or before the 1st day of October, A. D. 1855.

And it is further expressly agreed between the parties hereto, should said parties of the first part *do* not progress with said work as rapidly as is intended by this contract, or fail to comply with the requisitions of the street commissioner or city engineer aforesaid, from time to time, without delay, then and in that case said party of the second part may, after giving said parties of the first part one day's notice by and through the street commissioner, employ additional laborers, teams, or whatever else may be necessary, to complete said work within the specified time, or reconstruct any part thereof which may require to be so reconstructed, at the costs and expense of said parties of the first part.

And the city of Toledo, party of the second part, in consideration of the full performance of this contract on the parties of the *parties of the* first part, agrees to pay them at the rate of thirty-three cents per cubic yard for excavation, and nothing for embankment, and thirty dollars per thousand feet for lumber for culverts, in the following manner: Whenever said parties of the first part shall have fully completed said improvement, in accordance with the terms of this contract, the city engineer and street commissioner aforesaid shall give said parties of the first part a certificate to that effect, and the council of said city shall assess the costs and expense of said improvement upon the property liable therefor, as required by law, and shall make and deliver or cause to be delivered to said parties of the first part a copy of said assessment, and shall authorize and empower said parties of the first part or their assigns to collect the same. And it is further expressly agreed between the parties to this contract, that the council of said city may at any time, during the progress of said work, make any alteration in said work

which they may deem expedient, and said parties of the first part shall be fully compensated for any extra expense accruing from said alteration; and should said alteration decrease the aggregate cost of said improvement, said party of the first part shall only receive the amount done under the alteration at the above-named prices.

In testimony whereof, the parties hereto have executed this instrument the day and year first above written; said parties of the first part under their own proper hands and seals, and the city of Toledo by affixing its corporate seal hereto, and causing this contract to be signed by Samuel B. Scott, president of the council, and the authorized agent of the city.

E. CONNELLY.
ED. CREIGHTON, [SEAL.]
[SEAL.] SAML. B. SCOTT,
President Council.

On said bill of complaint are the following endorsements, to wit:

"Issue subpœna for defendant returnable rule day in November.
BASSETT & KENT,
Sol'rs for Complt."

"I hereby waive the issuing and service of process, and enter my appearance in the within suit.
Nov'r 18th, 1856. JOHN FITCH."

And afterwards, to wit, on the second day of February, in the year of our Lord one thousand eight hundred and fifty-seven, came the said respondent, John Fitch, by his solicitor, and filed in the clerk's office aforesaid his demurrer to said complainant's said bill of complaint, which said demurrer is in the words and figures following, to wit:

"The demurrer of John Fitch to the bill of complainant exhibited against him by Edward Creighton, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complainant contained to be true in such manner and form as the same are therein set forth, doth demur thereto, and for cause of demurrer showeth that the said complainant has not by his own showing made out a case which entitles him to the relief prayed for. Wherefore and for divers other defects and causes of demurrer appearing in the said complainant's bill, this defendant doth demur thereto and humbly demands the judgment of the court whether he shall be compelled to make any answer to the said bill, and prays to be hence dismissed with his costs.

M. R. WAITE,
Solicitor for Def't."

I, Morrison R. Waite, counsel for the within-named defendant, do hereby certify that the within demurrer is well founded in point of law.

M. R. WAITE.

THE STATE OF OHIO,
Lucas County, ss:

John Fitch, the within-named defendant, makes solemn oath and says that the within demurrer is not interposed for delay.

JOHN FITCH.

Sworn to before me and subscribed in my presence, Jan. 31, 1857.

J. M. FLOYD, [SEAL.]
Notary Public, Lucas Co., Ohio.

And afterwards, to wit, at the February special and adjourned term of said court, in the year of our Lord one thousand eight hundred and fifty-seven, and at the several terms of said court thereafter, this cause was continued to the November stated term of *co.* court in said year.

And afterwards, to wit, on the thirty-first day of December, in the year of our Lord one thousand eight hundred and fifty-seven, being at the November stated term of said court in said year, the following entry was made on the journal of said court, which is in the words and figures, to wit:

EDWARD CREIGHTON
vs. } No. 415. In chancery.
JOHN FITCH.

This cause came on to be heard on the demurrer of the defendant to the bill of complaint, and was argued by counsel, in consideration whereof, the court are of opinion that the said demurrer is not well taken, and do accordingly overrule the same.

And thereupon, on motion of the defendant by his solicitor, leave is granted him to file his answer to the complainant's bill by the first Monday in February next, and this cause is continued.

And afterwards, to wit, on the sixteenth day of March, in the year of our Lord one thousand eight hundred fifty-eight, being at the February special term of said court in said year, the following entry was made on the journal of said court, to wit:

EDWARD CREIGHTON
vs. } No. 415. In chancery.
JOHN FITCH.

This cause coming on further to be heard, and the defendant having failed to answer to the bill of complaint, and the court being fully advised in the premises, do find the equity of the case with the complainant.

And the court do further find that there is on the first day of this term due upon the assessments in the bill set forth, the sum of two thousand four hundred and twenty-eight dollars and ninety-three cents, ($2,428 93,) which is a lien upon the following lots respectively, to wit:

On lot No. 547, the sum of three hundred and seventy-two dollars and six cents, ($372 06;) on lot No. 538, the sum of three hundred and forty-three dollars and fifty-two cents, ($343 52;) on lot No. 539, the sum of three hundred and seventy-two dollars and six cents, ($372 06;) on lot No. 541, the sum of three hundred and seventy-two dollars and six cents,($372 06;) all of which are in the Port Lawrence division of the city of Toledo; and on lot No. 1461, in the Vistula division of said city, the sum of three hundred and seventy-two dollars and six cents, ($372 06;) and on the following lots in the Port Lawrence division of said city, as follows:

On lot No. 686, the sum of sixty-one dollars and ninety-seven cents, ($61 97;) on lot No. 571, the sum of sixty-one dollars and ninety-seven cents, ($61 97;) on lot No. 859, the sum one hundred and forty-two dollars and fifty-three cents, ($142 53.)

It is therefore ordered, adjudged, and decreed that the said defendant, within ten days from the rising of this term of this court, pay the said several sums of money, together with the costs of this suit, or, that in default thereof, that the said lots be sold and the proceeds of said sale be applied in payment of the amount as aforesaid found to be a lien upon each of said lots respectively, and the costs of this suit.

And thereupon, on application of M. R. Waite, esq., solicitor for the defendant, made in open court, it is ordered that an appeal to the Supreme Court of the United States, in behalf of said defendant, from this final decision of this court be and the same is hereby granted, and the court fix the amount of the bond for appeal, to be given by the said defendant, at three thousand dollars.

And afterwards, to-wit, on the twenty-fourth day of March, in year of our Lord one thousand eight hundred and fifty-eight, an appeal bond was filed in this case by the said appellant in this court, and the same is in the words and figures following, to-wit:

CIRCUIT COURT OF THE UNITED STATES,
For the Northern District of Ohio:

JOHN FITCH, Appellant
vs.
EDWARD CREIGHTON, Appellee. } In chancery.

Know all men by these presents, that we, John Fitch, Daniel McBain, are held and firmly bound unto the above-named Edward Creighton in the sum of three thousand dollars, to be paid to the said appellee, for the payment of which, well and truly to be made, we

bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 23d day of March, in the year one thousand eight hundred and fifty-eight.

Whereas, the above-named John Fitch, appellant, has prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse the decree rendered in the suit in chancery, wherein the said Edward Creighton is complainant and John Fitch defendant, by the circuit court of the United States for the northern district of Ohio:

Now, therefore, the condition of this obligation is such, that if the above-named appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then this obligation shall be void; otherwise, to remain in full force and effect.

JOHN FITCH, [SEAL.]
DAN'L McBAIN. [SEAL.]

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

I, Frederick W. Green, clerk of the circuit court of the United States for the northern district of Ohio, in the seventh circuit, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office in the cause within named.

In testimony whereof, I have hereunto subscribed my name officially, and affixed the seal of said circuit court, at the [SEAL.] city of Cleveland, in said northern district of Ohio, this twenty-third day of September, in the year of our Lord one thousand eight hundred and fifty-eight, and of the independence of the United States of America the eighty-third.

F. W. GREEN, *Clerk.*